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No. 03-1230

IN THE

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ of Certiorari to the Michigan Court of Appeals

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether Michigan's $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in the legal issue presented by this case: whether a flat-rate regulatory fee which is imposed on vehicles used in intrastate commerce is subject to invalidation under the negative Commerce Clause.

Petitioners urge the Court to treat Michigan's intrastate fee as a tax and to invalidate it under the test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Michigan's truck fee is not, however, a general revenue raising measure but a bona fide regulatory fee, which raises limited funds that are used to support the State's regulation of intrastate trucking. Beyond the fact that petitioners ignore the longstanding distinction between taxes and regulatory fees, adopting their position could usher in a wave of challenges to a wide variety of business, trade and professional licens-ing fees.

Subjecting Michigan's fee to scrutiny under the *Complete Auto* test is especially unwarranted because the economic burden of the fee is borne by in-state interests. Michigan firms engaging in interstate trucking must pay the same fee as out-of-state firms to use a truck in the intrastate market. Moreover, Michigan businesses and consumers that use intrastate trucking services ultimately bear the costs of the fee. These groups are presumed capable of protecting their interests in the State's political process. *Goldberg v. Sweet*, 488 U.S. 252 (1989).

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[1] The parties have consented to the filing of this brief *amicus curiae*; their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

Because of the importance of the issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

1. Michigan's $100 fee on vehicles engaged in intrastate commerce does not violate the negative Commerce Clause. As the Michigan Court of Appeals recognized, the fee is not a tax but a regulatory fee which supports the State's regulation of intrastate trucking. The court thus held that the fee's validity under the Commerce Clause should be determined by applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), rather than the four-part test of *Complete Auto*.

This Court has long recognized a distinction between taxes that are "used for the purpose of raising revenue" and regulatory fees that are charged to recover the costs of regulatory supervision. *Atlantic and Pacific Tel. Co. v. Philadelphia*, 190 U.S. 160, 164-65 (1903). "A law exhibiting the intent to impose a compensatory fee for [the costs of regulatory supervision] is *prima facie* reasonable." *Great Northern Ry. Co. v. Washington*, 300 U.S. 154, 159-60 (1937). A regulatory fee violates the Commerce Clause only when it is "so unreasonable and disproportionate to the service as to impugn the good faith of the law." *Id.* at 160.

Michigan's intrastate vehicle fee is clearly a bona fide regulatory fee which is imposed to cover the costs of the State's regulation of intrastate trucking. Petitioners themselves acknowledge that the fee is used for this purpose. *See* Pet. Br. 3. Moreover, the small amount of money that the State obtains from the fee refutes any contention that it serves as a general revenue-raising measure. Rather, the fee supports a substantial program of regulation, which benefits not only Michigan's citizens but also petitioners' members.

2. The Court has never subjected bona fide regulatory fees to scrutiny under the *Complete Auto* test. Indeed, the traditional theory used to justify judicial intervention under the Commerce Clause—that local interests dominate the political process to favor themselves at the expense of out-of-state interests—does not hold true when evenhanded regulatory fees are at issue. The Court has explained that "[n]ondiscriminatory measures . . . are generally upheld, in spite of any adverse effects on interstate commerce, in part because [t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994) (int. quotations and citation omitted).

Petitioners rely extensively on *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987). In *Scheiner*, the record established that a disproportionate burden of the marker fee and axle tax was borne by out-of-state trucks. No such evidence exists here. Moreover, the Court subsequently explained that *Scheiner* was based on the recognition that "Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989).

Here, by contrast, Michigan firms that engage in interstate trucking must pay the same fee as out-of-state firms to use a truck in the intrastate market. Moreover, because Michigan's intrastate fee applies to the intrastate market, its cost is ultimately paid by the State's consumers and businesses who ship intrastate. These groups are capable of protecting their interests in keeping shipping costs down through the State's political process.

3. Petitioners' invocation of the *Complete Auto* test further demonstrates why the Court should reject its extension to regulatory fees. Petitioners claim that the regulatory fee is discriminatory because "[o]n average, a trucking company that confines its operations to intrastate travel will drive far

more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intrastate and interstate." Pet. Br. 20. According to petitioners, a flat fee is "several times more valuable to a local business than to its out-of-state competitors" and therefore discriminates in violation of the Commerce Clause. *Id.*

This reasoning is flawed in several respects. As a general matter, its acceptance by the Court could require invalidation of the flat fees paid by members of licensed professions or trades who engage in their occupation in multiple States. Those who do so are undoubtedly aware that they will incur additional costs such as rent, advertising and travel costs. License fees are just another cost of doing business.

More specifically, petitioners' discrimination claim is insubstantial. Petitioners ignore that Michigan truckers who serve both the intrastate and interstate markets are subject to the same higher effective rate as their competitors who compete solely in the intrastate market. Moreover, trucking firms from neighboring States could well engage in more intrastate business and have a lower effective rate than their Michigan-based competitors.

Additionally, petitioner's cost-per-mile theory assumes without evidence that the vehicles used by intrastate and interstate companies have identical cargo-carrying capacities. But interstate carriers may well use larger trucks than their intrastate competitors and thus may carry more cargo and obtain more revenue per mile from intrastate trucking than do their solely intrastate competitors. Petitioners' theory thus requires too many speculative assumptions. Their failure to produce any evidence to substantiate their theory is fatal to their claim.

ARGUMENT

MICHIGAN'S $100 FEE ON VEHICLES ENGAGED IN INTRASTATE OPERATIONS DOES NOT VIOLATE THE COMMERCE CLAUSE

The threshold question in this case is the analytical framework to be applied to determine the constitutionality of Michigan's $100 fee on vehicles engaged in intrastate commerce. The Michigan Court of Appeals properly held that the $100 fee is a "regulatory fee" and not a tax. Consequently, it analyzed the fee under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), rather than the four-part test of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which applies to taxes. J.A. 98-102. Finding that the fee's effect "on interstate commerce is incidental and does not rise to the level of discrimination," and that the fee "serves a legitimate nondiscriminatory purpose [of] funding safety and related regulations," the court held that "the burden imposed on interstate commerce by the . . . fee is [not] clearly excessive in relation to Michigan's interest in regulating safety on its highways" and does not violate the Commerce Clause. *Id.* at 101-02. That holding is correct.

In petitioners' view, the fee is simply a tax in masquerade. *See* Pet. Br. 8. But repeatedly calling the fee a tax does not make it one. *Cf. City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 97 (1893) ("That . . . the [government] receives something which it may use as revenue, does not determine the character of the charge or make it a tax."). Contrary to the views of petitioners, *see* Pet. Br. 26 n.11, the Court's cases make clear that there is a difference between the two under the Commerce Clause. As explained below, a regulatory fee that is the same for both in-state and out-of-state vehicles and that is used for the limited purpose of supporting a regulatory program which benefits both in-state and out-of-state interests and not general revenue raising, does not raise the

same possibility of hidden discrimination against out-of-state interests.

The court of appeals therefore properly rejected petitioners' claim that the $100 fee violates the negative Commerce Clause. The court did not engage in a "manifest evasion of this Court's precedents," Pet. Br. 8, when it held that the fee's constitutionality should be evaluated under the *Pike* balancing test applicable to regulatory programs rather than the *Complete Auto* test governing taxes. As explained below, ample authority supports the view of the court of appeals that Michigan's fee is not a tax but a legitimate cost which is properly imposed on those who benefit from the existence of a regulatory program.

Moreover, the Court should reject petitioners' attempt to further expand the scope of the negative Commerce Clause to invalidate state regulation of purely intrastate commerce. Drawing the line at their challenge does not require the Court to engage in an exercise in metaphysics nor involve the "triumph of formalism over substance." Pet. Br. 32. Consistent with modern Commerce Clause doctrine, it recognizes that when the burden of state regulation falls on local interests, there is no justification for the Court to invoke the doctrine and strike down the statute. Rather, in such circumstances the state political process is the proper forum for resolving disputes over the appropriate level of regulation. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200 (1994). The judgment of the Michigan Court of Appeals should therefore be affirmed.

A. Michigan's Intrastate Vehicle Fee Is A Bona Fide Regulatory Fee And Not A Tax

1. The Court has long recognized a distinction between taxes that are used "for the purpose of raising revenue" and regulatory fees that are charged to recover the costs of regulatory supervision. *Atlantic and Pacific Tel. Co. v.*

Philadelphia, 190 U.S. 160, 164-65 (1903); *see also Western Union Tel. Co. v. Borough of New Hope*, 187 U.S. 419, 427 (1903) ("This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local government supervision, and as such is not in itself obnoxious to the [Commerce Clause].").

The Court has explained that "[i]n the exercise of its police power the state may provide for the supervision and regulation of public utilities, such as railroads . . . and may exact the reasonable cost of such supervision and regulation from the utilities concerned." *Great Northern Ry. Co. v. Washington*, 300 U.S. 154, 159-60 (1937). Relatedly, the Court has observed that:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society.

National Cable Tel. Ass'n, Inc. v. United States, 415 U.S. 336, 340 (1974).

In *Great Northern Railway* the Court held that "[a] law exhibiting the intent to impose a compensatory fee for such a legitimate purpose [as the cost of regulation] is *prima facie* reasonable." 300 U.S. at 159-60. Only when "the exaction [is] so unreasonable and disproportionate to the service as to impugn the good faith of the law" is it invalid under the Commerce Clause. *Id.* *See also Bourjois, Inc. v. Chapman*,

301 U.S. 183, 187-88 (1937); *Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1164 (6th Cir. 1993) ("Where a state or municipality exacts a fee for inspection of goods or equipment involved in interstate commerce, such assessments have only been found to interfere impermissibly with interstate commerce where excessive or where the locality has no defensible interest in such inspections."); *V-1 Oil Co. v. Utah Dep't of Pub. Safety*, 131 F.3d 1415 (10th Cir. 1997) (applying *Pike* to uphold an evenhanded inspection fee imposed on out-of-state facilities selling liquefied petroleum gas to Utah residents on ground that fee and inspection requirements were de minimis); *Frank & Son, Inc. v. Washington*, 966 P.2d 1232, 1240 (Wash. 1998) ("regulatory fee was not a tax subject to . . . apportionment"), *cert. denied*, 526 U.S. 1066 (1999).

Michigan's $100 per vehicle charge is clearly a bona fide regulatory fee which is designed to cover the costs of the State's regulation of intrastate vehicle operations. As petitioners acknowledge, "[p]roceeds from the fee are used primarily for the 'administration' of Michigan's law relating to the operation of motor carriers." Pet. Br. 3 (citing Mich. Comp. Laws § 478.2(1)). Indeed, in recent years, Michigan has collected less than $3.9 million from fees assessed in regulating intrastate trucking, some of which was attributable to the fee charged for a certificate of operating authority.[2] *See* Michigan Public Service Commission, *2004 Annual Report* 15; Michigan Public Service Commission, *2003 Annual Report* 10. The small amount of funds that Michigan collects from regulating intrastate trucking refutes any suggestion that the State's per-vehicle fee was enacted to

[2] An intrastate carrier must apply for and obtain an Intrastate Motor Carrier Certificate in order to engage in intrastate trucking. *See* Mich. Comp. Laws § 477.1. The $100 fee for this certificate has not been challenged by petitioners.

serve as a general revenue raising measure.[3] *See Ferndale Laboratories, Inc., v. Cavendish*, 79 F.3d 488, 494 (6th Cir. 1996) ("The modest amount of the fee, and the fact that it produces only about $100,000 per year for both new applications and renewals, convince us that the fee provision. . . is not designed as a revenue-raising measure; rather, it is a reasonable charge to cover administrative costs.").

Petitioners argue that beginning in 1995, Congress preempted "most state economic regulation of intrastate trucking operations" and faults Michigan because it "did not amend its motor carrier law or reduce the Michigan tax to reflect this change." Pet. Br. 3 n.2 (citing Federal Aviation Administration Authorization Act of 1994, Pub. L. No. 103-305, § 601(a) (1), 108 Stat. 1605, codified at 49 U.S.C. § 14501(c)). The State, however, still engages in a substantial program of regulation which provides substantial benefits to petitioners.

For example, the State requires that a trucker apply for and obtain a certificate of authority to engage in intrastate operations. The trucker must "submit proof of commercial public liability/property damage . . . insurance of a minimum of $750,000 for general commodities, and $1,000,000 where hazardous materials will be transported." *2004 Annual Report*, at 15.[4] Moreover, "[a]pplications for both intrastate for-hire authority and the transfer of existing authority are subject to safety reviews for compliance by the proposed carrier," which "include a review of the carrier's safety policy, drug and alcohol testing policy, and driver qualifications files,"

[3] The record indicates that the total of all fees Michigan collects in regulating trucking "closely matche[s]" the State's regulatory costs. J.A. 28 (Affidavit of Thomas R. Lonergan, Director, Motor Carrier Regulation Division, Michigan Pub. Serv. Comm'n).

[4] Intrastate household goods carriers must also obtain "an additional commercial cargo policy sufficient to provide coverage of the items transported." *2004 Annual Report* at 15.

2003 Annual Report at 10-11, as well as "U.S.D.O.T. records regarding safety ratings" and state police "files regarding vehicle inspections, violations found and citations issued." J.A. 32-33 (Lonergan affidavit). Under Michigan law, notice of all applications for intrastate operating authority is published bi-weekly; other carriers have the right to challenge an application on insurance and safety grounds by filing a protest, thus triggering a hearing on the application. *See* Michigan Pub. Serv. Comm'n, *Michigan Motor Carrier Handbook* 6, 9 (2000).

Furthermore, Michigan continues to regulate the rates charged by intrastate movers of household goods, an area which Congress did not preempt. *See 2004 Annual Report* at 16; 49 U.S.C. § 14501(c)(2)(B). Finally, the State monitors carriers to ensure that they maintain the required insurance coverage and investigates numerous complaints, *see 2004 Annual Report* at 15, which can be filed by "any person, firm, corporation, association . . . [or] motor carrier." *Michigan Motor Carrier Handbook* at 11.

Not only does Michigan's regulation of intrastate trucking protect the public, it also provides substantial benefits to petitioners' members. First and foremost, it ensures that their competitors cannot reduce their cost structure and undercut them by failing to obtain or maintain the required insurance. To similar effect, by requiring compliance with safety standards applicable to both vehicles and drivers, the State's regulatory program further protects truckers from those competitors who would cut corners by failing to perform required vehicle maintenance, hire unqualified drivers, require their drivers to exceed hours of service limits, or fail to conduct mandatory drug and alcohol testing. *See* Mich. Admin. Code r. 460.18203(4) ("[T]he commission will consider and make findings regarding whether the grant of authority may endanger the ability of existing carriers to

provide adequate, economical, safe, and efficient service.").[5] Finally, intrastate truckers engaged in the transportation of household goods are prohibited from undercutting their competition by charging predatory rates. *See* Michigan Pub. Serv. Comm'n, *Michigan Household Goods Motor Carrier Handbook* 14 (1998). Thus, it is clear that petitioners' members obtain substantial benefits from Michigan's regulation of intrastate trucking apart from those received by the general public.[6] The fee clearly passes muster under *Great Northern Railway*. *See* 300 U.S. at 159-60.

B. State Regulatory Fees Are Not Subject To The *Complete Auto* Test

1. Notwithstanding that this Court has long distinguished between regulatory fees and taxes, petitioners charge the Michigan Court of Appeals with engaging in "a manifest evasion of this Court's precedents" when it held that the fee should be analyzed under the *Pike* balancing test rather than the *Complete Auto* standard. Pet. Br. 22. Petitioners' accusation is unproved.

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[5]A complaint can be either informal, which merely requires a letter, or formal, with the latter triggering the right to a hearing before the Commission. *Michigan Motor Carrier Handbook* at 11. "Complaints may involve operations without a certificate or proper insurance or matters involving safety of drivers or vehicles." *Id.*

In 2004, the Commission processed 42 complaints; it served 39 formal complaints and scheduled 39 administrative hearings. *See 2004 Annual Report* at 15-16. The Commission also scheduled 310 informal conferences. *See id.*

[6]In faulting the State for failing to reduce the fee following federal preemption of the State's authority to regulate intrastate rates (*see* Pet. Br. 3 n.2; *id.* at 27 n.12), petitioners ignore that the amount has not been raised since 1990. *See* Mich. Comp. Laws § 478.2 (Bender 2004) (editor's notes). Salaries and other expenses have likely risen due to increases in the cost of living during the period.

As an initial matter, *amici* note that this Court has never subjected a bona fide regulatory fee to scrutiny under the *Complete Auto* test. Nor should it start now. Indeed, adoption of petitioners' approach would usher in a wave of challenges to other regulatory fees such as those paid by doctors, lawyers, accountants and other professionals which are typically flat and unapportioned. There would also be numerous challenges to state licensing requirements that are imposed on most trades. *See* Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 156-57 (1988) (asserting that "the licensee carrying on his trade in more than one jurisdiction bears a greater financial burden than his intrastate competitor merely because he is engaged in interstate commerce with the consequent interference with free trade among the states").

Contrary to the views of petitioners, the economic reality of Michigan's vehicle fee refutes the notion that the fee acts as a trade barrier which impermissibly discriminates against interstate commerce. The fee's practical effect is fundamentally different than that of the flat taxes at issue in *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266 (1987). Neither *Scheiner* nor its underlying economic rationale supports extending its holding to invalidate Michigan's regulatory fee.

Most significantly, the traditional theory used to justify judicial intervention under the negative Commerce Clause—that local interests dominate the political process to favor themselves at the expense of out-of-state interests—does not hold true when even handed regulatory fees are at issue. As the Court has explained, "Nondiscriminatory measures, like the even handed tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'" *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186,

200 (1994) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473, n.17 (1981)); *cf. Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978) (Deference to state safety regulations "derives in part from the assumption that where such regulations do not discriminate on their face against interstate commerce, their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.").

The Pennsylvania flat taxes which *Scheiner* invalidated included a marker fee, which only out-of-state vehicles were required to pay, and a per-axle charge that was imposed on all trucks merely for using the State's roads. *See* 486 U.S. at 274-75. The taxes were not regulatory fees, but rather general revenue measures which raised substantial sums. *See id.* at 276 n.10 (axle tax raised $80.4 million in fiscal year 1983-84). Significantly, out-of-state trucks paid more than five times the amount of axle-tax revenue that Pennsylvania's trucks paid. *See id.* at 276 n.9. Moreover, a number of States had responded to the marker fee, which out-of-state trucks paid at five times the rate of in-state trucks, by enacting retaliatory measures. *See id.* at 285; *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997) ("Avoiding . . . economic Balkanization, and the retaliatory acts of other States that may follow, is one of the central purposes of our negative Commerce Clause jurisprudence.") (internal quotations and citation omitted). Moreover, the State stipulated that the administrative cost of issuing the markers was $5 per truck, which was only one-fifth of the fee. *See Scheiner*, 483 U.S. at 274.

The *Scheiner* Court reasoned that the "practical effect" of the marker fee was "plainly discriminatory" because the tax "impose[s] a cost per mile on [out-of-state] trucks that is approximately five times as heavy as the cost per mile borne

by local trucks." 486 U.S. at 286. The Court therefore held that the tax violated the Commerce Clause because it impermissibly "favors in-state business over out-of-state business for no other reason than the location of its business." *Id.* As for the axle-tax, the Court reasoned that it had "a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate business to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-87 (quoting U.S. Const., art. I, § 8, cl. 3).

Assuming there is a basis in the text of the Constitution for the Court to invalidate facially-neutral state taxes and fees because of the burdens they impose on interstate commerce, *but see, e.g., Tyler Pipe Industries, Inc. v. Washington Dept. of Rev.*, 483 U.S. 232, 254 (1987) (Scalia, J., dissenting); *Camps Newfound*, 520 U.S. at 610-20 (Thomas, J., dissenting), there was at least a plausible ground for *Scheiner*'s conclusion that the marker and axle taxes were motivated by economic protectionism and discriminated against interstate commerce. In stark contrast to this case, there was evidence in the record establishing that the effective marker tax rate was five times higher for out-of-state than for in-state trucks. *See* 483 U.S. at 276 n.9. Most significantly, the evidence in the record established that the overwhelming burden of the axle tax fell on out-of-state interests. *See id.* at 276 n.10. Moreover, because the taxes fell on trucks merely for traveling through the State, it is clear that those who bore the overwhelming burden of the tax lacked representation in the State's political process. Indeed, in-state interests were exempted from the State's marker fee. *See id.* at 275.

To be sure, *Scheiner* did not expressly rely on this rationale. The Court, however, subsequently explained that this reasoning underlaid the decision. *See Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) (distinguishing *Scheiner* from state tax on interstate telecommunications services; "whereas Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change, the economic burden of the Illinois . . . tax falls on the Illinois . . . consumer, the insider who presumably is able to complain about and change the tax through the Illinois political process").

Moreover, because the taxes were imposed on all out-of-state trucks merely for passing through the State, their ultimate incidence was not borne by other in-state interests. Thus, in *Scheiner* there were no "major in-state interests adversely affected by the [taxes who could act as] a powerful safeguard against legislative abuse." *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17.

Michigan's regulatory fee is fundamentally different from the taxes at issue in *Scheiner*. First, in contrast to the marker fee at issue in *Scheiner*, the Michigan fee applies to vehicles without regard to their state of registration. Michigan-based truckers are required to pay the same fee to register their trucks as are out-of-state firms. And Michigan-based firms that engage in interstate trucking must also pay the fee to use a truck in intrastate trucking. Thus, there exist "major in-state interests adversely affected" by the fee who have the same interest as petitioners do in protecting against burdensome regulation. *West Lynn Creamery*, 512 U.S. at 200.

Second, consistent with the statute's purpose of funding the State's regulatory program (and in contrast to the axle tax at issue in *Scheiner*), the State receives only modest proceeds from the fee. *See* J.A. 24 (Lonergan affidavit) (in 1994, $2.9 million collected from intrastate vehicle decal fees), *2004 Annual Report* at 15; *2003 Annual Report* at 10; Mich. Comp. Laws § 478.6. Third, the fee has not been raised since 1990. *See* Mich. Comp. Laws § 478.2 (editor's notes) (Bender 2004). The latter two factors testify to the effectiveness of in-state interests in protecting against the enactment of unduly burdensome regulations. *See West Lynn Creamery*, 512 U.S. at 200; *see also Clover Leaf Creamery*, 449 U.S. at 473 n.17.

Finally, in contrast to *Scheiner*, where out-of-state interests bore the overwhelming burden of the taxes, *see* 483 U.S. at 276 n.9, there is no evidence that Michigan's fee results in out-of-state interests bearing the brunt of the costs of Michigan's program.[7]

Thus, there is no basis for accepting petitioners' unstated premise—that Michigan's in-state trucking interests acquiesced in the fee because it would give them a competitive advantage over their out-of-state competitors in the intrastate trucking business. Indeed, were it true that Michigan's fee imposed an undue burden on interstate commerce, that burden would ultimately manifest itself in two ways, both of which would impact Michigan's consumers and businesses who use intrastate trucking services and would be subject to correction in the State's political process.

First, truckers participating in Michigan's intrastate market would pass the cost on by charging higher prices.

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[7] Petitioners also rely on *Nippert v. City of Richmond*, 327 U.S. 416 (1946), which invalidated a municipal license tax on interstate commerce. But the tax was just that—a revenue-raising measure—and was not defended as a regulatory fee. While the tax had a flat-rate component, it was also based on the previous year's gross receipts. *See id.* at 418 & n.2 (citing Richmond City Code, ch. 10, § 23). The Court further explained:

> [W]e cannot be unmindful, as our predecessors were not when they struck down the drummer taxes, that these ordinances lend themselves peculiarly to creating those very consequences [of discriminating against interstate commerce and favoring local business] or that in fact this is often if not always the object of the local commercial influences which induce their adoption. Provincial interests and local political power are at their maximum weight in bringing about acceptance of this type of legislation. With the forces behind it, this is the very kind of barrier the commerce clause was put in the fundamental law to guard against.

Id. at 434. As explained herein at pp. 15-18, no such argument can be made with respect to Michigan's regulatory fee.

Those prices would be paid by Michigan's consumers and businesses.

Second, some firms might decline to participate in the intrastate market thereby resulting in less competition in that market. The consequence of less competition in the intrastate market would also be higher prices for the numerous Michigan consumers and businesses who ship intrastate.

As a result, the interests of out-of-state truckers are not only aligned with those of Michigan's interstate truckers, but also with those of the State's consumers and businesses who ship intrastate and are capable of protecting their interests in obtaining lower prices in the State's political process. *See Goldberg*, 488 U.S. at 266. This is thus a far different situation than *Scheiner* because there is no basis for concluding that the State's political process was motivated by economic protectionism in enacting the intrastate fee.

Indeed, even if Michigan's regulatory fees were excessive, because those fees apply to an intrastate market and the costs they impose are ultimately paid—either directly or indirectly—by the State's own residents and businesses, the Court has no reason for intervening, let alone for applying the *Complete Auto* test to Michigan's regulatory fee. *See Scheiner*, 483 U.S. at 303 (O'Connor, J., dissenting, joined by Rehnquist, C.J. & Powell, J.) ("Creating an 'internal consistency' rule of general application is an entirely novel enterprise that the Court undertakes for the first time in this case. Yet the Court gives no reason why such a rule is necessary or desirable . . . .").[8]

The purpose of the negative Commerce Clause is not to protect Michigan's consumers and businesses from the costs

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[8] *See also Tyler Pipe*, 483 U.S. at 254 (Scalia, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (The "internal consistency principle is nowhere to be found in the Constitution. Nor is it plainly required by our prior decisions.").

of over-regulation even if that was truly at work here. *See Goldberg*, 488 U.S. at 266. Under these circumstances, there is no basis for inferring discrimination merely because some out-of-state interests may not obtain the same cost per mile as do some in-state interests. Indeed, because Michigan firms that engage in interstate trucking would also pay a higher cost per mile to truck intrastate than would a Michigan firm that engages only in intrastate trucking, petitioners' position rests on the implausible premise that Michigan's intrastate firms are more politically powerful than the combination of the State's own interstate truckers and those businesses and consumers that use intrastate truckers. This "practical effect" (*Scheiner*, 486 U.S. at 286) likewise counsels against judicial invalidation of the fee.

2. Petitioners' application of the *Complete Auto* test further demonstrates why the Court should reject its extension to regulatory fees. Asserting that the discriminatory effect of Michigan's fee "is undeniable," petitioners contend that "[o]n average, a trucking company that confines its operations to intrastate travel will drive far more miles within the taxing state and will obtain a vastly greater benefit from its intrastate fee than will an otherwise identical company that travels both intrastate and interstate." Pet. Br. 20. According to petitioners, "[s]uch a local company therefore will pay the tax at a lower effective rate than does its interstate competitor." *Id.* Invoking *Scheiner*, petitioners argue that "'imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause.'" *Id.* (quoting 483 U.S. at 296).

Petitioners' reasoning is flawed in numerous respects. As a general matter, acceptance of the rationale that flat fees are discriminatory because they impose a higher effective rate on out-of-state licensees (as well as on in-state licensees who engage in regulated busineses, trades or professions in

multiple States) than on in-state licensees, would require invalidation of the flat fees which licensed professionals and tradesmen are required to pay to engage in their occupations in multiple States. This begs the questions of why it is a Commerce Clause problem and why a State must apportion a fee because a licensee makes the voluntary choice to practice a profession or trade in multiple States. Undoubtedly, those doing so might incur additional costs such as rent, advertising expense and fuel/travel costs. License fees are just another cost of doing business, which must be considered in deciding whether to engage in regulated activity in multiple States.

More specifically, petitioners' assertion that Michigan's fee is discriminatory is insubstantial. First, as explained above, petitioners ignore that Michigan truckers who participate in both the intrastate and interstate markets are subject to the same higher effective rate as their competitors who compete solely in the intrastate market. Second, Michigan is bordered by several States; a number of major industrial centers are only a short drive away. Trucking firms from northern Ohio, Indiana and Illinois could well engage in more intrastate business and have a lower effective rate than their Michigan-based competitors.

Finally, even if it is true that in-state trucks have a lower cost per-mile than do interstate trucks, that by itself does not establish that the fee imposes an undue burden on interstate commerce. In contrast to *Scheiner*, there is no evidence in this case that the burden of Michigan's regulatory fee falls disproportionately on interstate commerce. Indeed, petitioners' cost-per-mile rationale is not a valid method for proving whether the fee has a discriminatory effect because it assumes—without evidence—that the vehicles used by intrastate and interstate companies have identical cargo-carrying capacities. Absent such evidence, petitioners' contention that a company engaged in intrastate trucking "obtain[s] a vastly greater benefit from its intrastate fee" than does a company

that engages in both interstate and intrastate commerce, Pet. Br. 20, is simply speculation. *Cf. Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 586 (1986) (Steven, J., dissenting) ("Speculation about hypothetical cases illuminates the discussion in a classroom, but it is evidence and historical fact that provide the most illumination in a courtroom.").

Michigan's fee applies to any commercial vehicle (or combination) without regard to its weight or size. Interstate truckers, however, typically use trucks with large cargo-capacities. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 665 (1981) (plurality op.). Again, there is no evidence in this record establishing that the vehicles used solely in Michigan's intrastate market are identical in size to those used by firms engaged in interstate trucking. By using large trucks, interstate carriers can carry more cargo and obtain more revenue per mile from engaging in intrastate trucking than do their solely intrastate competitors that use smaller vehicles. Thus, petitioners' theory that the regulatory fee discriminates because Michigan firms obtain "a privilege that is inherently more valuable to the local company" than it is to the interstate company, Pet. Br. 16, does not establish that the fee imposes an undue burden on interstate commerce.[9]

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[9]While some of this Court's cases have not required a party bringing a Commerce Clause challenge to present empirical evidence in support of the claim, petitioners' position requires the acceptance of several speculative assumptions. *Amici* respectfully suggest that petitioners have declined to present empirical evidence supporting their claim for good reason: the fee does not discriminate against or impose an undue burden on interstate commerce.

Petitioners further contend that "[t]he extent of the discrimination is immaterial" because "the Court 'has never recognized a "de minimis" defense to a charge of discriminatory taxation under the Commerce Clause.'" Pet. Br. 29 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996)). It would, however, be illogical for a doctrine that examines undue burdens on interstate commerce not to be subject to a de minimis defense.

Petitioner's claim is further refuted by Michigan law, which allows truckers faced with "unusual temporary demand" or an equipment "breakdown" to obtain pre-numbered 72-hour permits authorizing a vehicle's use in intrastate movements for the nominal fee of $10 per permit. *See* Mich. Admin. Code r. 460.18412; *see also Michigan Motor Carrier Handbook* at 9. More than 4,900 of these permits were issued in 2004. *See 2004 Annual Report* at 15.

This provision clearly benefits firms engaged in interstate trucking. An interstate carrier (whether from Michigan or another State) that needs more "temporary extra equipment for a greater volume of business than was anticipated" can divert one of its interstate trucks and need not pay the full

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Moreover, the proposition relied upon by petitioners derives from cases involving facially discriminatory taxes. *See Fulton*, 516 U.S. at 333. The two cases *Fulton* cited for this proposition also involved facially discriminatory tax schemes. *See Associated Industries of Mo. v. Lohman*, 511 U.S. 641, 654 (1994) (rejecting claim that use tax was "facially invalid in every jurisdiction"); *Maryland v. Louisiana*, 451 U.S. 725, 756-57 (1981) (discussing various tax credits and exemption which only in-State interests could claim). Likewise, *Associated Industries* cited *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992), in support of the proposition that "the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." 511 U.S. at 650. But the statute at issue in *Wyoming v. Oklahoma* "expressly reserve[d] a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States." 502 U.S. at 455. The provision thus discriminated on its face. *See id.* *Associated Industries* further cited *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988), which also involved a statute that discriminated on its face. *See* 511 U.S. at 650; *New Energy*, 486 U.S. at 274 ("The Ohio provision at issue here explicitly deprives certain products of generally available beneficial tax treatment because they are made in certain other States, and thus on its face appears to violate the cardinal requirement of nondiscrimination.").

annual fee to use the vehicle in the intrastate market. *Michigan Motor Carrier Handbook* at 9. Moreover, the Commission has never "undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations . . . based upon its own business circumstances." J.A. 23 (affidavit of Thomas R. Lonergan, Director Motor Carrier Regulation Division, Mich. Pub. Serv. Comm'n). The availability of these 72-hour permits—which petitioners do not even acknowledge[10]—further rebuts petitioners' conten-

[10] In their statement, petitioners illustrate the functioning of the Michigan fee with what they describe as "a realistic example":

> To illustrate the operation of the Michigan tax, consider the example of a truck that accrues virtually all of its annual mileage traveling interstate, but makes a single intrastate delivery while passing through Michigan by hauling a load between two points in the State. *That truck is obligated to pay the full $ 100 Michigan tax.* At the same time, an identical truck that travels the same number of annual miles but confines its operations to Michigan, conducting hundreds of trips within the State during the course of the year will pay the same $100 tax. The only way for the interstate truck to avoid payment of the Michigan tax would be for it to forgo intrastate business while it is passing through Michigan.

Pet. Br. 3-4 & n.3 (emphasis added & footnote omitted).

Petitioners' hypothetical does not completely describe the statute's operation. Assuming that the carrier has a valid operating certificate (a requirement which petitioners do not challenge) and has at least one truck registered for intrastate use, a carrier faced with "unusual temporary demand" can use a 72-hour permit (which can be obtained in advance) which allows an additional truck to be used in intrastate carriage for the nominal fee of $10. *See* Mich. Comp. Laws § 478.2(3). Thus, a truck need not necessarily forgo intrastate business nor pay the $100 fee to engage in "a single intrastate delivery." Pet. Br. 3. Indeed, as long as hours of service rules are complied with, *see* 49 C.F.R. Pt. 395, a truck might be used to make multiple intrastate deliveries within a 72- hour period.

tion that Michigan is engaged in economic protectionism of in-state interests.

C. Michigan's Intrastate Vehicle Fee Does Not Violate The Commerce Clause

As demonstrated above, there is no basis for applying the *Complete Auto* test to Michigan's even handed regulatory fee and calling into question scores of similar fees throughout the nation. Petitioners have failed to produce any evidence establishing that the fee is motivated by economic protectionism. Indeed, given the existence of substantial in-state groups who share the same interest as petitioners, petitioners are mistaken in suggesting that this Court rather than the state political process is the appropriate forum for resolving their claim that the fee is unduly burdensome. Whether the validity of the fee is assessed under *Pike* or *Great Northern Railway*, *see* pp. 7-11 *supra*, it is clear that Michigan's intrastate vehicle fee does not violate the negative Commerce Clause.

CONCLUSION

The judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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